state in a proceeding to oust the members of the franchises which they assume to possess. 4 THOMPSON, CORP., § 5275.

In view of the foregoing considerations, the correct rule would seem to be that a contract executed by a foreign corporation, which has failed to comply with a statute prescribing certain formal conditions on which the corporation may transact business within the state, provided the statute does not expressly invalidate such contracts, can be enforced by the corporation; especially when the statute imposes a distinct penalty for non-compliance. Accordingly, a plea alleging such non-compliance in avoidance of an action on the contract, should be adjudged to be a valid ground of demurrer. A. J. A.

GOOD FAITH AS TEST OF COMMON LAW MARRIAGE.—Does a woman who, in innocence and good faith, marries a man who has a wife living, and continues in ignorance of the impediment after it is removed, become a lawful wife upon the death of the first wife?

This is a question which has vexed the courts for years. It confronted the supreme court of Michigan in a recent case,—*In re Fitzgibbons' Estate* (1910), — Mich. —, 127 N. W. 313. The facts were, briefly, these: William Fitzgibbons married Armenia Allen in the state of New York in 1868. They had three children. In 1878 he left her and came to Saranac, Michigan, where he established a business. In 1881 he went through a marriage ceremony with Sarah Stewart, to whom he represented himself to be an unmarried man. By acquaintances and by society the pair were regarded as married. Their life together was in all respects that of an affectionate married couple. One child was born to them, in 1891. Fitzgibbons, however, knew that his first wife was still living, undivorced, and at intervals sent money for her support. In 1903, Armenia died. About a year later, Fitzgibbons died. Between these two events he continued to live with Sarah as before, treating her affectionately and holding her out to the world as his wife. The evidence tended to show that he never knew of Armenia's death, and that the second wife never knew of her existence. Upon his death the children of the first marriage claimed the estate. The Michigan widow contested the claim on the ground that she was the lawful widow, and entitled to share in the distribution of the estate.

The trial judge instructed the jury that if they found that the plaintiff acted in good faith throughout, in ignorance of the existence of the impediment to her marriage with Fitzgibbons, she became his legal wife as soon as the impediment was removed. The jury so found, and this instruction was assigned for error.

By an evenly divided vote, four to four, the supreme court affirmed the ruling of the trial judge. Mr. Justice MOORE, who wrote the opinion upholding the validity of the marriage, relied upon the natural justice of the case and upon the authority of a recent New York case, *"In re Wells Estate*, 123 App Div. 79, 108 N. Y. Supp. 164, which was based on similar facts, and which held that a common law marriage was presumed as soon as the impediment was removed, provided the parties continued to live together as

husband and wife. He cites a strong dictum in *Barker* v. *Valentine,* 125 Mich. 336, written by himself, and unanimously concurred in by the court; also recent Illinois and Nebraska decisions.

Mr. Justice BROOKE, who presented a strong opinion to the contrary, argued that, since the marriage was originally void, the relations under it were meretricious, and a new contract after the death of the first wife was essential to change the meretricious relation into a common law marriage. He denied that any presumption of such common law marriage could arise in this case, because the evidence showed that one party did not know it was possible, and the other did not know it was necessary, hence there could have been no meeting of minds—not even an uncertainty upon which to base a presumption.

The authority cited by the learned justice to support the proposition that a new contract was required is SCHOULER, DOMESTIC RELATIONS, Ed. 5, § 26: "A union once originating between man and woman, purely illicit in its character, and *voluntarily* so, there must appear some formal and explicit agreement between the parties thereto, or a marriage ceremony, or some open or visible change in their habits and relations pointing to honest intentions, before their alliance can be regarded as converted into either a formal or informal marriage." This rule is unquestionably authoritative, but does not fit the facts in the case under discussion. The union was not *voluntarily* illicit on the part of the woman, though in legal theory it may have been meretricious. Analysis of the cases on this general subject shows that this distinction is an important one, though frequently ignored. With respect to the good faith of the parties, the cases fall readily into three classes to which different rules apply.

(1) Cases in which the first union was known to both parties to be illicit.

In these cases a new contract must be shown. *Clark* v. *Barney,* — Okla. —, 103 Pac. 598; *White* v. *White,* 82 Cal. 427, 7 L. R. A. 799, 23 Pac. 276; *Rose* v. *Rose,* 67 Mich. 619, 35 N. W. 802; contra, *Campbell* v. *Campbell* (Breadalbane's Case), L. R. 2, H. L. 269.

(2) Cases in which both parties desire marriage and contract in good faith, the impediment existing unknown to both.

In these cases lawful marriage will be presumed immediately upon removal of the impediment. *Manning* v. *Spurck,* 199 Ill. 447, 65 N. E. 342; *Robinson* v. *Ruprecht,* 191 Ill. 424, 61 N. E. 631; *Land* v. *Land,* 206 Ill. 288, 68 N. E. 1109; *Eaton* v. *Eaton,* 66 Neb. 676, 92 N. W. 995; *Chamberlain* v. *Chamberlain,* 68 N. J. Eq. 736, 6 AM. & ENG. ANN. CAS. 483, 3 L. R. A. (N.S.) 244; *Lufkin* v. *Lufkin,* 182 Mass. 476, 65 N. E. 840; *Schuchart* v. *Schuchart,* 61 Kans. 597, 60 Pac. 311, 50 L. R. A. 180; *Teter* v. *Teter,* 88 Ind. 494.

(3) Cases in which one party knows of an impediment, but conceals it from the other, usually the woman, who, in good faith, enters into marital relations with him under a void ceremonial marriage.

The principal case comes under this third division.

Decisions on this point conflict. (a) One line of cases holds that a valid common law marriage is presumed from the time the impediment is removed,

if cohabitation continues. *Townsend* v. *Van Buskirk,* 33 Misc. (N. Y.) 287; 68 N. Y. Supp. 512; *In re Wells Estate,* supra; *In re Terwilliger's Estate,* 63 Misc. 479, 118 N. Y. Supp. 424; *De Thoren* v. *Attorney General,* L. R. 1 App. Cas. 686; *Stein* v. *Stein,* 66 Ill. App. 526; *Donnelly* v. *Donnelly's Heirs,* 8 B. Mon. (Ky.) 113; *Blanchard* v. *Lambert,* 43 Iowa 228; *Busch* v. *Supreme Tent,* etc., 81 Mo. App. 562. The doctrine of these cases is admirably expressed in 1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION, § 970 (quoted with approval in *Barker* v. *Valentine,* supra): "If the parties desire marriage, and do what they can to render their union matrimonial, yet one of them is under a disability—as where there is a prior marriage undissolved—their cohabitation, thus matrimonially meant, will, in matter of law, make them husband and wife from the moment when the disability is removed; and it is immaterial whether they knew of its existence, or its removal, or not, nor is this a question of evidence. This doctrine is overlooked in some of the cases, but it is abundantly sustained by others, and the reasoning on which it rests is conclusive."

The learned author's last observation is somewhat overdrawn. A review of the authorities cited in support of it fails to disclose any reasoning more "conclusive" than this: "The policy of the law favors matrimony and legitimacy rather than concubinage and bastardy, and hence every *reasonable* presumption should be allowed to support the former and to defeat the latter." *State* v. *Worthingham,* 23 Minn. 528, "only to be negatived by certain and satisfactory evidence." *Piers* v. *Piers,* 2 H. L. Cas. 381.

(b) The view that facts to support a presumption of a new contract must be shown, has been taken by several courts. *Severa* v. *National Slavonic Society,* etc., 138 Wis. 144, 119 N. W. 814. (Woman married divorced man within time proscribed by statute; *held,* not common law wife). *Collins* v. *Voorhees,* 47 N. J. Eq. 315; *Voorhees* v. *Voorhees,* 46 N. J. Eq. 411, 19 Atl. 172; *Cartwright* v. *McGown,* 121 Ill. 388, 12 N. E. 737; *Hunt's Appeal,* 86 Pa. St. 294; *Howland* v. *Burlington,* 53 Me. 54; *Randlett* v. *Rice,* 141 Mass. 385.

Collins v. *Voorhees,* supra, is on all fours with the principal case, except that the impediment was removed by divorce instead of by death. Although he does not cite that case, Mr. Justice BROOKE follows closely the argument of Chief Justice BEASLEY therein, as will appear from the following extract. "* * * The court found as a fact in this case that the husband, Voorhees, knew that he had no legal power or right to contract this second marriage; that he was aware that the divorce fraudulently obtained by him was a nullity; what he did consent to was to deceive the so-called second wife. * * * Voorhees, as just stated, had consented to an illegitimate connection, attended with the concomitants of habit and repute. The continuance of such concomitants could not, by their unassisted probative force, lead, with any show of reasoning, to the conclusion that the man, when he was at liberty to form a legal connection, with the woman, had embraced the opportunity. To treat evidence which was in all respects and to the utmost degree in accord with the original purpose, as proving, *proprio vigore,* a change of such purpose,

appeared to be not only inadmissible according to legal rules, but as being in logic ridiculous. * * *"

(c) A few cases have held the "husband" estopped to deny his marriage with one who became his spouse in good faith, if cohabitation has continued after the impediment. *Hervey* v. *Hervey,* 2 Wm. Black. 877; *Purcell* v. *Purcell,* 4 Hen. and Munf. 507; *Chamberlain* v. *Chamberlain,* 68 N. J. Eq. 414—all suits for divorce and alimony. Apparently there is but one case in the books which holds the heirs and personal representative of the husband estopped to deny the "widow's" right to dower after his death. *Rose* v. *Clark,* 8 Paige (N. Y.) 576, (at p. 581) approved in the Wells case and quoted in the principal case. See, for an opinion rather inconsistent with this view, *In re Sloan's Estate* (1908), 50 Wash. 86, 96 Pac. 684. On principle, however, there is no difference between holding the "husband" estopped in a suit for alimony and denying the defense of no marriage to his heirs in a suit for dower. In the Chamberlain case, Vice Chancellor Stevenson criticizes the decision in *Collins* v. *Voorhees* and advances the estoppel argument —(p. 423) *** "It has always seemed strange to me that no one suggested that Voorhees was estopped to deny that he consented, concurrently with this woman, to enter into the marriage state when he had in the most solemn manner represented to her that he in fact did enter into that state with her, and in reliance upon that representation she had acted so much to her injury, that in accordance with the familiar rule such estoppel became operative when he became capable of doing what he had falsely pretended to do. ***

"I know of no reason why the doctrine of estoppel *in pais* should not be applied in dealing with the consent which is necessary. * * *"

The courts have given this estoppel doctrine scant attention; nevertheless it has an undeniable advantage over both the other views—it is more logical than the first and more equitable than the second.

The doctrine of the New York Courts of Appeals is expressed in the following sentence from *In re Wells Estate*:—"* * * Where one person is free to enter into the matrimonial relation and does so in good faith, but the other party is incapable of entering into such relations because of a former wife or husband living, or other impediment, when such impediment is removed, if the parties continue to introduce and recognize each other as husband and wife, and are so recognized by their relatives, friends and by society, it ought to be held that from such moment they are actually husband and wife, and that under such circumstances it is of no importance that a formal agreement to live together as husband and wife was not entered into, or that either did not know that the impediment of such an agreement had been removed, when, in fact, it had been so removed, and both parties were competent to enter into the matrimonial state."

Mr Justice BROOKE clinches his argument against the above doctrine by an hypothesis which seems unanswerable, and which was, in fact, ignored by the contrary opinion. He says at page 315: "To predicate the legal status of the appellee upon her good faith alone, is not only contrary to authority, but would result possibly, in the absurdity of a man leaving two or more legal widows. If deceased, in the case at bar, had entered into a contract

of marriage with a woman in South Carolina, the state in which he was doing business at the time of his death, that woman, entering into the relation in good faith, would also have become his wife upon the removal of the impediment, and would now also be his legal widow." (See *Fort Worth & Rio Grande Railway Co.* v. *Robertson,* — Tex. Civ. App. —, 121 S. W. 202).

None of the cases which have adopted the New York view is based upon entirely satisfactory reasoning. The logical difficulty which opposes its adoption, that it may presume a contract of marriage when the facts show that no contract could have been made, seems unsurmountable. It seems a miscarriage of justice, when an innocent woman has been a faithful wife to a man for many years and has borne him children, to deny her children's legitimacy and her own right to be supported out of the fortune which she has, perhaps, helped to amass. Yet this very harshness, if the contrary view were uniformly adopted, would have a salutary effect in that it would tend to minimize the number of cases of this nature by discouraging marriage without thorough investigation of the status of the prospective spouse.

In cases like this, where a strong equity exists in favor of the plaintiff, the doctrine of estoppel might well be applied. Although it would not affect the real status of the parties, it would secure to innocent victims of men like Fitzgibbons, property rights to which they are "in good conscience" entitled, and it would attain this desirable result without disregarding the well settled principles of reasoning which are completely ignored in the cases agreeing with Mr. Bishop's contention. J. S. P.